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FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
American Communications Services, Inc.)
)
MCI Telecommunications Corp.)
)
Petitions for Expedited Declaratory Ruling)
Preempting Arkansas Telecommunications)
Regulatory Reform Act of 1997 Pursuant to)
Sections 251, 252, and 253 of the)
Communications Act of 1934, as amended.)

CC Docket No. 97-100

REPLY COMMENTS OF GTE

GTE Service Corporation and its affiliated communications companies (collectively, "GTE")¹ hereby submit their comments in reply to the comments submitted pursuant to the Commission's Public Notice issued in this proceeding.² The Commission requested comments on whether it should preempt Sections 4 and 5 of the Arkansas Telecommunications Regulatory Reform Act of 1997

¹These comments are filed on behalf of GTE's affiliated domestic telephone operating companies: GTE Alaska, Inc., GTE Arkansas Inc., GTE California Inc., GTE Florida Inc., GTE Hawaiian Telephone Company Inc., The Micronesian Telecommunications Corp., GTE Midwest Inc., GTE North Inc., GTE Northwest Inc., GTE South Inc., GTE Southwest Inc., Contel of Minnesota, Inc., and Contel of the South, Inc.

² *American Communications Services, Inc. and MCI Telecommunications Corp.*, CC Docket 97-100, *Public Notice*, DA 00-50 (rel. Jan. 14, 2000).

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("Arkansas Act"), relating to universal service and the provision of service by eligible telecommunications carriers ("ETCs").

As stated in more detail below, the Arkansas Act is largely consistent with federal law and rules dealing with universal service issues. Thus, for example, the requirement that an ETC serve the entire service area of an incumbent carrier found in Section 5(b)(1) of the Arkansas Act is consistent with federal policy and, therefore, should not be preempted. Nevertheless, in two specific instances, the Arkansas Act is expressly inconsistent with federal law and should be preempted. First, the provision in Section 5(d)(1) of the Arkansas Act that prevents the Arkansas Public Service Commission from designating more than one eligible telecommunications carrier ("ETC") in rural areas is inconsistent with Federal law and Commission policy, because it prevents the Arkansas state commission from making the public interest determinations that are required by Section 214(e)(2) of the Telecommunications Act of 1996 ("the 1996 Act"). Second, to the extent that the language in Section 5(b)(5) of the Arkansas Act, which provides portable universal service support only to those facilities "owned and maintained" by an ETC, can be read to exclude support for ETCs that use UNEs to provide service, it is inconsistent with Federal law and should be preempted.

**I. CONDITIONING UNIVERSAL SERVICE SUPPORT FOR ETCs
ON PROVIDING SERVICE THROUGHOUT AN ILEC'S
EXCHANGE AREA IS CONSISTENT WITH FEDERAL LAW**

Section 5(b)(1) of the Arkansas Act requires that a competitive ETC provide universal service in an area identical to that served by the incumbent. This section of the Arkansas statute is entirely consistent with Federal law. As an initial matter, as CenturyTel also observes, this is a non-discriminatory requirement which impacts all potential competitive carriers equally.³ More importantly, as illustrated in the comments of the Rural Arkansas Telephone Systems,⁴ this requirement tracks precisely with the mandate in the 1996 Act that ETCs offer services "throughout the service area for which the designation is received."⁵ Even if it did not, the courts have ruled that the statute permits states to impose additional requirements in granting ETC applications.⁶

Western Wireless' argument that this requirement constitutes a barrier to entry for wireless providers, because they may be unable to provide facilities-based service throughout the service area, is without merit.⁷ The Commission has already considered this question and has disposed of it by stating that in the event a wireless carrier is unable to provide service throughout a service area, the "carrier could supplement its facilities based service with service provided via

³ See Comments of CenturyTel at 6.

⁴ See Comments of Rural Arkansas Telephone Systems at 11.

⁵ 47 U.S.C. § 214(e)(1).

⁶ See *Texas Office of Public Utility Counsel*, 183 F. 3d 393, 418 (5th Cir. 1999).

resale.”⁸ The 1996 Act itself clearly envisions this same result, by permitting an ETC to comply with the service area requirement by “either using its own facilities or a combination of its own facilities and resale of another carrier’s services.”⁹

Contrary to Western Wireless’ claim that the Arkansas Act discriminates against wireless carriers, there is no indication that this requirement impacts these providers any more harshly than wireline providers. A wireline carrier might just as likely need to supplement its network via resale as a wireless carrier.

In the end, since this provision neither bars entry nor discriminates in favor of one carrier over another, it is not inconsistent with Federal law and should not be preempted.

II. A BLANKET DECLARATION THAT ONLY ONE ETC WILL BE DESIGNATED IN RURAL AREAS CONFLICTS WITH THE REQUIREMENT THAT ETC DESIGNATIONS BE MADE “IN THE PUBLIC INTEREST”

Section 214(e)(2) of the Telecommunications Act requires that a state Commission make a public interest finding before deciding whether to recognize an additional ETC in a rural area.¹⁰ However, Section 5(d)(1) of the Arkansas

⁷ See Comments of Western Wireless at 5.

⁸ *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776, 8882 (¶ 189) (1996) (“*Universal Service Order*”).

⁹ 47 USC § 214(e)(1).

¹⁰ “Before designating an additional telecommunications carrier for an area
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Act prevents the Arkansas public utility commission from making individual public interest determinations by flatly prohibiting the state commission from recognizing additional ETCs in rural areas.¹¹ As reflected in the comments of Western Wireless and CenturyTel, this blanket statutory determination is inconsistent with the Federal mandate that decisions on ETCs be made only after an individual public interest finding.¹²

By requiring a public interest determination in making an ETC designation, federal law prohibits a predetermination of a specific outcome absent such a determination. Rather, federal law requires a state PUC to “make a *special finding* that the designation is in the public interest.”¹³ This requirement means that state commissions must consider unique factual circumstances involving the service area and the specific carrier-applicant in order to “make such special findings.”¹⁴ Courts, too, have recognized the 1996 Act requires states to make a public interest finding.¹⁵

served by a rural telephone company, the State commission shall find that the designation is in the public interest.” 47 U.S.C. § 214(e)(2).

¹¹ “For the entire area served by a rural telephone company...for the purpose of the AUSF and the federal Universal Service Fund, *there shall be only one eligible telecommunications carrier* which shall be the incumbent local exchange carrier that is a rural telephone company.” ARK. CODE. ANN. § 23-17-405(d)(1) (emphasis added).

¹² See Comments of Western Wireless at 3, 4; Comments of CenturyTel at 9.

¹³ *Universal Service Order*, 8882 (¶ 190) (emphasis added).

¹⁴ *Id.* (emphasis added).

¹⁵ In *Texas Office of Public Utility Counsel*, the Fifth Circuit observed that Section GTE Service Corporation
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Public interest findings require that a decision be based on policy as applied to individual factual circumstances.¹⁶ It is simply not possible to make these “special findings” by passing a law of general applicability, as the Arkansas legislature has done. The total prohibition on additional ETCs embodied in Section 5(d)(1) of the Arkansas Act is not consistent with Section 214 of the 1996 Act. Therefore, the Commission must preempt Section 5(d)(1).

Moreover, the Tenth Amendment does not shield this Section of the Arkansas Act from preemption. While the Supreme Court has held that the federal government may not compel a state to enact specific legislation or implement federal regulatory programs, the court has also “recognized Congress’ power to offer States the choice of regulating ... activity according to federal standards or having state law preempted by federal regulation.”¹⁷ In this instance, Arkansas could either regulate according to the public interest standard prescribed by Congress or do nothing. It could not take the alternative course of regulating according to its own standard, one that is wholly inconsistent with Congress’ direction. Since this section prohibits what federal law expressly requires, it is not protected by the Tenth Amendment.

214(e)(2) “confers discretion on the states to designate more than one carrier in rural areas ... consistent with the ‘public interest’ requirement.” *Texas Office of Public Utility Counsel*, 183 F. 3d 393, 418 (5th Cir. 1999).

¹⁶ See, e.g., *Petition for Waiver Filed by Heartland Telecommunications Company of Iowa and Hickory Tech Corporation*, 14 FCC Rcd 13661, ¶ 7 (1999) (noting that the public interest obligation includes an investigation of special circumstances).

¹⁷ *New York v. United States*, 505 U.S. 144, 167 (1992).

III. THE FCC SHOULD PREEMPT SECTION 5(b)(2) OF THE ARKANSAS ACT TO THE EXTENT THAT THIS SECTION WOULD PROHIBIT THE RECEIPT OF FUNDS FOR UNEs

Section 5(b)(2) of the Arkansas Act restricts the receipt of funds only for the portion of facilities that an ETC “owns *and maintains*.”¹⁸ The scope of this provision is far from clear. The Arkansas commission has not yet interpreted this section. It is possible that the “maintains” requirement only means that the entity ensure that the facilities continue to operate in the manner desired in order to receive funding. If this is the case, then this provision could be consistent with federal law. On the other hand, The Arkansas Act can logically be read, as CenturyTel’s comments indicate, to prohibit support to that part of the service provided through UNEs.¹⁹ If the maintenance requirement is interpreted in this manner as to exclude support for UNEs used by ETCs to provide local service, then the statute is directly counter to federal law and policy and should be preempted.²⁰

In its examination of the universal service provisions of the 1996 Act, the Commission concluded that certain unbundled network elements (“UNEs”) that are used to provide services that are eligible for universal service support are considered the carrier’s “own facilities.”²¹ The FCC, in making this determination,

¹⁸ ARK. CODE ANN. § 23-17-405(b)(2) (emphasis added).

¹⁹ Comments of CenturyTel at 11.

²⁰ One of the obligations an ILEC has in providing UNEs is to maintain the facility.

²¹ *Universal Service Order*, 8862 (¶ 154).

concluded that “it is unlikely that Congress intended to deny designation as eligible to a carrier that relies, even in part, on unbundled network elements to provide service, *given the central role of unbundled network elements as a means of entry into local markets.*”²² Moreover, the Federal-State Joint Board on Universal Service likewise refused to restrict eligibility for funding only to those carriers providing service wholly over their own facilities.²³

However, competitive neutrality would not be maintained if funding is not received notwithstanding the fact that a carrier entered the market using its own facilities, including through UNEs.²⁴ An ETC must also receive funding for these UNEs if the support is to promote entry into the local services market. Because a carrier that uses UNEs relies upon the ILEC to maintain the facilities, Section 5(b)(2) of the Arkansas Act could be read to disqualify such carriers from obtaining funding. Such an interpretation simply does not square with the federal statute and the policy that it seeks to support. On those grounds, the section should be preempted.

²² *Universal Service Order*, 8863 (¶ 155) (emphasis added).

²³ *See id.* at 8864 (¶ 156).

²⁴ *See id.* at 8866 (¶ 162) (noting that the provider using UNEs pays on the basis of cost and it would be absurd not to subsidize those costs in high cost areas).

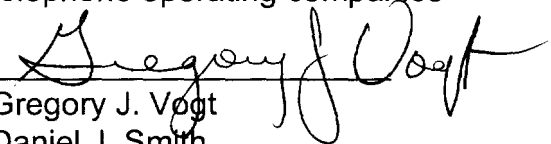
IV. CONCLUSION

For the above reasons, GTE respectfully requests the Commission to find that Sections 5(b)(1) and 5(b)(2) of the Arkansas Act are preempted and that Section 5(b)(5) is not preempted.

Respectfully submitted,

GTE SERVICE CORPORATION
and its affiliated domestic
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CERTIFICATE OF SERVICE

I, Jackie Martin, hereby certify that a copy of the foregoing Reply Comments of GTE was served this 3rd day of March, 2000, by hand on the following:

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